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Re: Errata Sheet for the Expert Report of Dr. Engel

Dear Robert and Leslie,

Enclosed please find the Errata to Dr. Engel's Expert Report. As I discussed with Robert last week the mistakes that underlie the need for the Errata were due to the rush to meet the Expert Report deadlines as set by the Court. Dr. Engel explains that this circumstance, coupled with the fact that Dr. Jeon, his post doctorate assistant on the modeling, was in Korea when the communication mistake was made, caused the Report to be based on erroneous model runs.

Please note that Dr. Engel explains that the substance of the major opinions are unchanged and that the model runs that form the basis for the Errata were provided to Defendants at the time of the Report and Dr. Engel's considered materials. The files that contain these runs are:

1.1.FUTURE_100YR.zip, 1.1.FUTURE_100YR_NOLitter.zip,
1.2.FUTURE_50YR_GrowthPoultry.zip, and 2.LAST_50YR_variable Litter.zip

When we spoke last week you informed me that Defendants planned to file a Motion to Strike the Errata produced by Plaintiff's experts. It is our hope that Defendants avoid such a course of action because under Rule 26(e) of the Federal Rules of Civil Procedure, a party is under a duty to supplement "at appropriate intervals its disclosure under subdivision (a) if the party learns that in some material respect the information disclosed is **incomplete or incorrect** and if the additional and corrective information has not otherwise been made known to the other parties during the discovery process or in writing ..." (emphasis added). *See also Palmer v. Asarco Inc.*, 2007 WL 2254343, *3 (N.D. Okla. Aug. 3, 2007). Here the State has submitted Errata for all experts who have discovered such incorrect or incomplete information. Under Rule 26(e), the State not only has the right to supplement these expert reports, it has a duty to supplement these reports. Therefore, Defendants' contemplated motion to strike the Errata is not

justified. In *Minebea Co., Ltd. V. Papst*, 231 F.R.D. 3,7-8 (D.D.C. 2005) v. Court rejected a motion to strike a supplemental expert report where the supplemental report was submitted in order to "correct an earlier figure which the expert...deemed to be inaccurate or incorrect." The State urges Defendants not to file such a motion which will unnecessarily waste the time and resources of the Court and the parties.

As I mentioned last week, Dr. Wells, must re-run his model scenarios with the data used for the Engel Errata because he also used the erroneous data that Engel relied on in his report (Dr. Wells received the P loading data for his model from Dr. Engel). Dr. Stevenson also relied on this erroneous data from Dr. Engel for a portion of his report and he is reviewing the new data to determine if it affects any of his opinions. Dr. Wells expects to have new Errata completed in three weeks and Dr. Stevenson will advise as to any new Errata in two weeks. It is also possible that the Wells Errata may influence Drs Cooke & Welch in some part of their report, but we will not know this for sure until Dr. Wells completes his modeling runs. We are not aware of any other Errata and hope to have the Wells, Stevenson & Cook/Welch (if needed) Errata to you in three weeks. Finally, Dr. Engel has provided some additional considered materials which will be provided to you under separate cover on a disc from Motley Rice. These additional materials are spreadsheets which Dr. Engle uses to evaluate the model outputs for his Report. These spreadsheets change with the corrected modeling data.

Please call if you have any questions. We will also make Dr. Engel available by phone to your modeling experts if they have any questions.

Very Truly Yours,

David P. Page / sdk
David P. Page

DPP/sdk

Enc.